IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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J U D G M E N T

Rama @ Rehman
Vs.
State of Rajasthan

S.B. CIMINAL APPEAL NO.227/1988 UNDER SECTION 374 CR.P.C. AGAINST THE JUDGMENT DATED 23.05.1988

DATE OF ORDER :: 20th November, 2006

PRESENT

HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

Mr.Sandeep Mehta, Advocate for the appellant.
Mr.Rameshwar Dave, Dy.Govt. Advocate for the respondent.

BY THE COURT

REPORTABLE

The appellant has filed the present appeal against the judgment dated 23.05.1988 passed by the Sessions Judge, Pali thereby convicting him for offence under Section 8/18 of the NDPS Act, 1985 and sentencing him to rigorous imprisonment of 10 years with fine of Rs. 1 lac and in default payment whereof, to further undergo two years simple imprisonment.

Facts in brief giving rise to the present appeal are that Shri Deepankar Banerjee, Inspector, Narcotic Bureau (Preventive Branch) working in the office of Deputy Commissioner, Narcotic Bureau, Neemach (M.P.) on receiving a source information proceeded to village Kali Patiya, Tehsil Raypur District Pali in state of Rajasthan along with Sub-Inspector Shri C.P. Dhyani, Sub-Inspector Shri Chaurasiya, Sub-Inspector Ramharsh Singh and Bhanwar Singh, Salim, Govind Singh, Dinesh Rawal all constables and 2 and 3 other employees of the department and reached there early in the morning of 29.07.1986. They surrounded the house of accused Rama who was present there at that time. When the accused came out of the house, Inspector Deepankar Banerjee introduced himself to the accused and told him that he wanted to search his house. Accused gave his consent. The Inspector searched his house in the presence of Motbir witnesses Dhanna and Nura. During search, the Inspector found two bags in the Almira of the room situated in the southern side of first floor. When they were opened, each of bags was found to contain 20 plastic bags of smaller size which had dark substance in the shape like biscuit. When the Inspector tested and smelled the substance, it was found to be opium. On weighment of all the bags, their total weight was 37 kg. & 500 gm. A sample of 50 gm. was taken separately and sealed for chemical examination. Inspector Banerjee prepared the search

and seizure memo and Panchnama in the presence of Motbir witnesses and accused was arrested. Site plan was also prepared and the sample in the sealed cover was also marked and its memo was prepared. It was thereafter that recovered contraband opium, sample for chemical examination and all other papers and the accused were brought to the office of Preventive Center of Central Narcotics Bureau at Beawar and produced before the Inspector Shri Bhanwar Lal Ojha. Bhanwar Lal Ojha registered a criminal case on the basis of report submitted to him by Shri Deepankar Banerji. Sample of the opium in sealed condition was handed over to Shri Deepankar Banerji himself for being taken to Nimach for chemical examination. Upon examination, sample was found to be opium. On completion of investigation, challan was filed against the accused for offence under Section 8/18 of the NDPS Act. Prosecution has produced as many as eight witnesses and exhibited various documents in support of its case. The learned trial court on conclusion of the trial, convicted the accused and sentenced him as indicated above. Hence this appeal.

I have heard the arguments advanced by Shri Sandeep Mehta learned counsel for the appellant and Shri Rameshwar Dave, learned Public Prosecutor and perused the record.

Shri Sandeep Mehta has argued that the there are inherent infirmities and improbabilities in the evidence of the prosecution which the trial court has completely ignored while recording finding of conviction against the appellant. The learned trial court has also not formulated the points of determination hence the judgment was vitiated and liable to be set aside on this count. The prosecution has failed to prove that the sample was duly sealed and the seal remained in tact till the same reached to the hands of chemical examiner. Statements of prosecution witnesses PW-4 Shri Deepankar Banerjee and PW-6 Dinesh Kumar are contradictory on the vital aspect of the matter as to where the sample remained after the same was sealed till it was handed over to Shri Banerjee. The report of the chemical examination is therefore inadmissible. It has been argued that mere presence of morphine 01.80 % is not sufficient to style the substance as opium. It is a highly complex body consisting of 25 alcholities out of which mechonic acid is very important ingredient and without finding the presence of mechonic acid the substance can not be held to be opium. The seizing authority has not come out with clean hands. It remains the mystery as to how Shri Deepanker Banerjee while sitting at Neemach in state of Madhya Pradesh overnight thought it fit to travel a distance of about 300 kms. and visit Kali Patiya in district Pali of State of Rajasthan and that too without obtaining any warrant of search.

In the ordinary course of human conduct, Shri Banerjee would have contacted the local cell of Narcotics Bureau even on telephone and instructed them to effect the search. It has been further argued that Shri Deepanker Banerjee has not produced the relevant entries made by him for his departure from Neemach, which would have clinched the issue. His conduct was abnormal throughout and he had no hesitation in making departure from the contents of the documents prepared by him on the spot on the material points. It has been further argued that the search conducted by Shri Banerjee is illegal because he had not complied with the requirements of Section 155 Cr.P.C. It was also argued that no representative sample was taken because on the basis of sample of 50 gm. entire material cannot be classified or declared to be opium. It has been further argued that since Shri Baherjee had no territorial jurisdiction in the area where the search was made, entire proceedings were vitiated and were rendered illegal. The view taken by the learned Sessions Judge that since Shri Prakash Chandra Dhyani was associated with the search, the question of jurisdiction became immaterial is manifestly erroneous. In the first place, it has not been proved that Shri Prakash Chander Dhyani at that time was posted at Beawar. No document has been produced in the support of the aforesaid assertion. Secondly, it appears from the prosecution evidence itself that he was a member of raiding

party. Consequently, it would be evident from the contents of the seizure memo itself that the search and seizure were conducted by Shri Deepankar Banerjee whereas Deepankar Banerjee has tried to give different version at the trial and therefore, his version at the trial cannot be believed in face of the contents of the seizure memo.

Shri Sandeep Mehta, learned counsel for the appellant further argued that the prosecution has completely failed to establish that the house which was searched was of and in possession of the appellant and that the substance alleged to have been recovered was in conscious possession of the appellant. It has been argued that the trial court had erred in not realizing that the prosecution has failed to prove beyond all reasonable doubt that the alleged recovery of the opium was made in a legal and proper manner. Only two independent motbir witnesses were recruited by the prosecution to prove the alleged recovery and they too have not supported the prosecution case during the trial. All other witnesses were members of the raiding party. Thus, the alleged recovery of the opium becomes doubtful. Even otherwise, the recovery has not been made in a legal manner and there has been a deliberate attempt to defeat the legislative safeguards. Conviction of the appellant based on such illegal search and seizure of the opium

deserves to be set aside. It has been further argued that there is nothing in the entire prosecution evidence to suggest that the provisions of Section 57 of the NDPS Act have been complied with, according to which full report as to the particulars of the arrest and seizure has to be submitted to the immediate superior officer within 48 hours. Further more, the provisions of Section 55 of the NDPS Act have also not been complied with. The prosecution has failed to get the samples preserved for examination by the Central Forensic Science Laboratory, sealed with the seal of the Station House Officer of the Police Station in whose area the seizure was made. This was a serious lapse on the part of the prosecution and violated the provisions of Section 55 of the Act. It has also been argued that the prosecution story has become suspicious and doubtful on account of the late arrest of the appellant. Even though the alleged recovery of the opium was admittedly complete at 8 AM, there was no reason for arrest of the appellant as late as 11 AM although it is alleged that he was throughout present at the scene of the recovery. This clearly lends support to the defence story that the appellant has been substituted as an accused for some other person. Learned counsel for the appellant has further argued that the appellant was not supplied with the copy of the search and seizure memos prepared at the time of seizure. This amounts to a clear violation of the provisions of Sub-section (6) of Section 100 Cr.P.C. and as

such the entire search and all the subsequent proceedings taken thereunder are illegal. Conviction of the appellant based on such an illegal search and seizure stands vitiated and deserves es to be set aside. Since no information was sent to the Magistrate concerned timely and accused appellant was not produced before the Magistrate immediately, therefore there was ample opportunity with the raiding party to manipulate the case which has actually been done in the present case.

Shri Sandeep Mehta, learned counsel for the appellant further argued that there were two motbir witnesses to the seizer namely Nura and Panna. While Nura has been examined as PW-3 but the prosecution has omitted to examine Dhanna and this despite the fact that PW-3 Nura in his cross-examination has given a suggestion that he himself (Nura) and brother of the accused appellant were implicated in the false criminal case on 29.07.1986 and it was Dhanna who had given a sum of Rs.5000/- to an officer is illegal for securing their release. It was during this incident accused Rama had altercation with officers of the Narcotic Bureau as to why they have enropped his brother with the said case. The narcotics people have framed accused Rama in the present case. It has been further argued that the conscious possession of the contraband opium and the house where it was recovered has been proved on the basis of

certificate dated 23.09.1986 given by Shri Nen Singh Sarpanch of Gram Panchcyat, Sumer who was examined as PW-2, but he in his statement before the Court has not supported the case of the prosecution and has stated that he did not know whether the accused owns residential house at Patia Ki Dhani. He has even stated that he gave the certificate on the basis of fact that the name of the accused was entered in the voter list. Even otherwise, it has been argued that though the search and seizure were made on 29.07.1986, but the certificate has been obtained on 23.09.1986 whereas according to the requirement of law such certificate should have been obtained prior to search. Apart from this, the only other proof of residence of the accused produced by the prosecution is the voter list. No other document showing the ownership of the accused over the house in question has been produced and therefore there was no proof of the fact that the appellant had exclusive possession over the house in question. On the contrary the defence has produced the Ration Card of the accused which was issued in the year 1985 as Exhibit-D/3 according to which the accused was resident of village Rup Nagar. Defence has also produced certificate of Sarpanch as Exhibit-D/4 verifying the fact that the accused was resident of village Rupnagar. DW-1 Sama, Sarpanch of village Rupnagar has proved this certificate of the fact that the accused appellant was resident of village Rupnagar which is 4 klm. away

from Kali Patiya village. Learned counsel further argued that there was no compliance of Section 42 (1) and 42(2) of the NDPS Act. It has not been proved that whether the sample of seal was sent to the laboratory at Nimach, Exhibit-P/1 is the receipt given by the Government and administrative officer on 31.07.1986 where the officer has acknowledged the receipt of one sample of contraband opium. While this receipt issued on 31.7.1986 but PW-1 Dinesh Kumar has stated that he deposited the sample on 30.07.1986 itself and having obtained a receipt returned back on the very same day. He has stated that this sample was given to him by Banerjee but Shri Banerjee did not obtain any receipt from him. PW-4 Deepankar Banerjee in his statement no were stated that he obtained the receipt from Dinesh Kumar when he handed over the sample to him for being delivered at laboratory.

Learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in Backodan Abdul Rahiman Vs. State of Kerala reported in 2002 SCC (Cr.) 791 on the question of non-compliance with the mandatory provisions contained in Section 42 (2) and 50 of the NDPS Act. He also relied upon the judgment of the Hon'ble Supreme Court in Niranjan Prasad & Ors. vs. State of Madhya Pradesh reported in 1996 Cr.LR (SC) 354 on the question of conscious possession of the accused in

the context of the argument ownership of the appellant over the house in question has not been proved.

On the other hand, learned Public Prosecutor supported the judgment of the learned trial court and argued that there was no defect in the investigation conducted by the Narcotics Bureau inasmuch as Narcotics Inspector Shri Banerjee while conducting the search and seizure had duly associated local Sub Inspector Shri P.C. Dhyani. Merely because the motbir witnesses turned hostile, it cannot be said that the accused was not the resident of village Kali Patiya. The prosecution has clearly proved that accused was resident of Kali Patiya but has also proved that the house in question where from the contraband opium was recovered was owned by him and this proved his conscious possession over the opium weighing 37.5 Kg. Learned Public Prosecutor in this connection referred to Exhibit-P-4 the certificate issued by the Sarpanch of village Sumer and argued that even after the motbir witnesses PW-3 Nura has turned hostile but in his statement he has admitted that Exhibit-P/4, P/5, P/6 and P/7 had his signatures and therefore it has been argued that even the statement of an accused who has turned hostile can also be relied upon partly if it inspires confidence. Learned Public Prosecutor relied upon that part of the statement of PW-3 Nura wherein he has stated that the accused Rama was

resident of Kali Patiya Ki Dhani. The learned Public Prosecutor argued that the suggestion with regard to the illegal gratification of Rs.5000/- given to PW-3 Nura in his cross-examination was totally baseless and unfounded. Such a suggestion has rightly been rejected by the learned trial court. It has been argued that in appropriate cases if the circumstances demand, the search can be made even without warrant because procurement of warrant would have consumed considerable time and in that event there was every possibility of the contraband article being removed from the house in question and accused fleeing from the site. It has been argued that the contraband opium and its sample were sealed and panchnama was prepared on the site at the house of the accused appellant himself. Reference is made to panchnama Exhibit-P/4. Both of them were duly packed and sealed in the presence of the motbir witnesses. Sample of the speciman seal were duly prepared and preserved vide Exhibit-P/6 in the presence of the motbir witnesses. Site plan was also prepared. Exhibit-P/9 is the information given to the Local Inspector of Narcotic Bureau at Beawar by Inspector Shri Banerjee with which he produced all these documents for further investigation at their end. The contraband article was proved to be an opium within the meaning of Section 2 (15) of the NDPS Act. Reference has been made to the communication dated 20th October, 1986 sent by Dy. Narcotics Commissioner, Kota to

Inspector (Preventive) of Beawar in which it has been clarified that all the preventive cells are part of establishment of Dy. Narcotics Commissioner at Kota and had jurisdiction all over the state for purpose of inspection under NDPS Act as notified by Notification No.7/85 dated 14.11.1985 and therefore the jurisdiction of Beawar cell also extended to all over Rajasthan. Learned Public Prosecutor therefore argued that the criminal appeal be dismissed and the conviction and sentence be maintained.

I have carefully examined the arguments advanced by learned counsel for the parties and perused the record.

Although learned counsel for the appellant has assailed the judgment of the learned trial court on several grounds but he has basically harped upon two major points namely conscious possession and lack of proof of conscious possession over the contraband opium and related thereto, the ownership and possession of the house in question and secondly the link evidence in regard to the sample of contraband article which was ultimately proved to be opium by the chemical examiner. Conclusion on these two points would therefore decide the question whether or not the conviction recorded by the learned trial court in the present matter deserves to be maintained.

While it remains a fact that the search and seizure in the present case has been made by PW-4 Deepankar Banarjee who is posted as Inspector at Neemach in state of Madhya Pradesh whose jurisdiction does not extend to Kali Patiya ki Dhani in Tehsil Beawar, but he claims to have received some source information and on that basis rather then informing his counter part at Beawar, himself proceed to village Kali Patiya ki Dhani which is 300 kms. away from his headquarters. According to him he started from Indor at about 4:5 PM on 28.07.1986 and then stayed at Beawar Guest House for 2-3 hours and arrived at village Kali Patiya Ki Dhani early in the morning of 29.07.1986. He states that an advance party of few constables was deputed by him to village Kali Patiya Ki Dhani and when he reached there, he with their help surrounded the house of the accused where he was found present. It also remains a fact that no search warrant was obtained by the aforesaid Inspector. Explanation which has been given on the question with regard to his jurisdiction is that Shri Banarjee had associated a Local Sub Inspector Shri P.C. Dhyani but on careful examination of his statement as PW-4 he does not anywhere reveal as to how and in what manner he associated the local cell of the Narcotics Bureau at Beawar in the process of search and seizure. The prosecution has also not produced any evidence of the fact that Shri P.C. Dhyani, Sub Inspector, one of the members of the

raiding party was posted at Beawar. But that apart, the further analysis of the evidence show that the sole basis on which the prosecution founded its case as to ownership and possession of the accused Rama over the house in question was the certificate dated 23.09.1986 which has been proved as Exhibit-P/2. In the first place, the search was conducted as far back as 29.07.1986 whereas the certificate was obtained almost two months thereafter on 23.09.1986. This certificate is merely a handwritten certificate signed by Sarpanch of Gram Panchcyat, Sumer who has been examined as PW-2 Nen Singh. PW-2 Nen Singh in his statement has however not supported the case of the prosecution. He has stated that he did not know whether or not the accused Rama had any residential house at village Kali Patiya Ki Dhani. He has further stated that he gave the aforesaid certificate only because the officers of the Narcotics Bureau asked him to do so and he issued the certificate on the basis of voters list although he told the Narcotics people that he had no knowledge about the residential house owned by accused Rama.

Curiously enough, the sole basis on which the prosecution seeks to prove the ownership of the accused-appellant over the house in question has not been proved by any other evidence particularly when the only document which they produced has not been proved. PW-2 Nen Singh has stated that he gave the

said certificate on the basis of voter list of village Kali Patia Ki Dhani, thus implying the inclusion of the name of the accused therein, yet the prosecution has not produced and proved copy of the voter list of village Kali Patia Ki Dhani during trial. The Ration Card of village Rupnagar and the residence certificate of that village given by Sarpanch of Gram Panchcyat Roopnagar have been proved respectively by DW-1 Sama and DW-2 Ami. The voter list of village Roopnagar has also been produced as Exhibit-D/7 wherein the name of the accused has been mentioned at Serial No.64 and this voter list has been proved by DW-2 Ami who is sister of the accused appellant. PW-4 Deepankar Banarjee in his cross-examination stated that he went to village Kali Patia Ki Dani for the first time and did not inquire about the Patta of that house nor did he see any Patta or any other title document of the house. He has also stated that there were several male and female members of the family residing in that house but he was not in a position to tell their relationship with the accused. He prepared the report Exhibit-P-9 with which he submitted all the papers namely Panchnama, arrest and search memo, samples of the seal, the site plan and seized articles to the Local Inspector of the Bureau. The other witnesses examined by the prosecution have not stated anything about the ownership of the accused over the house in question so as to prove his exclusive possession over the contraband

opium.

In the light of the evidence that has come on record, the question with regard to the exclusive possession of the house and therefore the conscious possession of the accused, over contraband opium assumes significance. Section 8 of the NDPS Act when it forbids possession of any narcotic drug or psychotropic substance, it postulates not only conscious possession but also exclusive possession. This Act contains stringent penal provisions and therefore the insistence by the law courts on the higher degree of proof because the accused upon eventual conviction is visited with sever penalties. In the present case, the prosecution has utterly failed to discharge its obligation to prove ownership and exclusive possession of the accused appellant over the house in question.

Their Lordship of Hon'ble Supreme Court in Niranjan Prasad (supra) while reversing the judgment of the High Court acquitted the accused in that case in which recovery of the contraband article was made from a residential flat whose ownership was not proved in the name of the accused. In the present case also the prosecution has failed to discharge its burden in proving the ownership of the accused appellant on the house in question and therefore it has also failed to prove that

contraband article was in exclusive possession of the accused particularly when evidence has come on record that there were many other male and female persons residing in that house.

Coming now to the next question, it would be evident that the prosecution has not proved whether any sample of the contraband article was sent alongwith a forwarding letter because no such forwarding letter has been produced and exhibited during trial. PW-4 who himself conducted the search and seizure and prepared all the documents – namely seizure memo, panchnama of the recovery memo Exhibit-P/4, arrest memo Exhibit-P/5, the site plan Exhibit-P/7 etc., handed over all these documents to the Preventive Inspector, Narcotics Bureau at Beawar along with Exhibit-P/9. This was because he did not have the jurisdiction over the area in question. PW-4 Deepankar Banerjee has not stated as to why he did not associate the local Inspector with the search and seizure in question.

PW-5 P.C. Dhyani has stated that he was posted at Beawar but he has not explained as to in what manner he was associated with the team led by PW-4 Deepanker Bernjee which conducted the raid and how and in what manner he was picked up for being associated with the team led by him. Moreover, PW-4 has himself stated that although he handed over the case for further

investigation to the Local Inspector but he took the sample of the opium alongiwith him to Nimach. Exhibit-P/9 is the report which he gave to the Local Inspector at 16 hrs. on 29.07.1986 and at the bottom of this report he himself has written that he was carrying the sample for chemical examination. This version contained in Exhibit-P/9 where PW-4 stated that he was carrying the sample does not appear quite in order. PW-6 Ramesh Johri Sub Inspector, Chittorgarh who was then posted at Beawar has stated that the packet containing the sample was entered in the Malkhana Register at Beawar and was handed over to Shri Deepankar Banerjee but he did not obtain any receipt from Shri Banarjee for giving such sample to him because the sample was handed over to Shri Banarjee by the Local Inspector Shri Ojha and there was therefore no question of his having secured any receipt from Shri Banerjee.

PW-7 Bhanwar Lal, states that the two packets one of sample and other of the remaining contraband opium were received by him in sealed condition and they remained in intact sealed condition with him. But the packet containing sample in sealed condition was carried by Shri Banerjee himself to Nimach for chemical examination whose report is Exhibit-P/10. Surprisingly, PW-7 who is Local Inspector has also not thrown any light as to whether PW-4 approached him prior to conducting

search and seizure at the house of the accused appellant in village Kali Patia Ki Dhani and whether it was at his authorization that PW-5 P.C. Dhyani was associated with the team led by Inspector Banerjee. Not only this, he has not even stated that P.C. Dhyani was posted at Beawar at the relevant time. Though, PW-4 in his statement has claimed that he handed over the sealed packet to Deepankar Banarjee for being delivered at laboratory at Neemach but he was conspicuously silent on the question whether or not he obtained any receipt for handing over such sample to Shri Deepankar Banarjee.

Careful examination of Exhibit-P/9 would show that PW-4 Deepankar Banerjee while handing over the investigation to the Local Inspector stated in advance that he was retaining the sample for being delivered at laboratory at Nimach and yet the packet containing the sample was entered in the Malkhana register and was handed over to PW-4 Shri Banarjee. But no receipt was obtained from Deepankar Banarjee for handing over the sample to him for being delivered at laboratory at Nimach. When PW-4 Deepankar Banarjee handed over the sample to PW-1 D.K. Chandrawal for depositing it with the laboratory at Nimach, he also did not obtain any receipt from the said D.K. Chandrawal. Factors discussed above create a reasonable doubt whether or not it was very same sample which was handed over

to the chemical examiner and whether Exhibit-P/10 is the chemical examination report of the very same sample. The prosecution has thus failed to prove the charge against the accused appellant beyond reasonable doubt thus entitling him to benefit of doubt. Analysis on the entire evidence would thus show that the manner in which the search and seizure in question was made by PW-4 Deepankar Banerjee, leaves very many missing links and becomes doubtful particularly because PW-4 Deepankar Banerjee had no jurisdiction over village Kali Patia Ki Dhani.

Upshot of the above discussion is that the present appeal succeeds and is hereby allowed. The impugned judgment dated 23.05.1988 passed by learned Sessions Judge, Pali is set aside and the conviction and sentence recorded therein are set aside. The bail bonds and sureties of the accused appellant be discharged.

[MOHAMMAD RAFIQ],J.

A.K.Chahar/-